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PERSONAL LIBERTY IN FRANCE.

In the month of July two great Republics celebrate the blessings of Liberty and the rights of citizens and of men. Scarcely have the echoes of Independence Day died away when the strain is taken up in another continent and the sister Republic of France keeps her national holiday in commemoration of the overthrow of the incubus that weighed so long upon her fair land.

The message of 1776 took twelve years to cross the ocean but, like a mighty storm, it gathered force as it swept along and, when it reached the eastern shores of the Atlantic, it burst upon the old world with all the violence of a hurricane. That tempest has long since died away, giving place to the majestic calm which must inevitably follow, in the history of a nation, a period of desperate struggle and successful effort.

A column marks the spot where the gloomy bastille, the bane of France, once stood, but those who seek the true monument of the Revolution and of the foundations of French liberty must, like the visitor to the noble building sprung from the genius of Sir Christopher Wren on the other side of the channel, "look around them" and behold it in the laws and institutions of the French people of the present day.

It cannot be unbecoming for an American to enquire as to the extent and nature of the liberty so hardly won by France, for the great de Tocqueville set us the example of international criticism long ago, when he visited our country and set down his personal

views on what he saw and what he thought the world would see in time to come.

What then, it may be fairly asked, strikes most forcibly the legal minded American who comes to France to study her institutions?

I think it is the condition of personal liberty that seems to him the most astonishing feature in the whole political structure.

A visit to the site of the Bastille prompts the question "what have the French really gained by the demolition of her concrete evidence of a system of arbitrary imprisonment?"

The destruction of the Bastille was meant to be the destruction of much more than a mere building. The stout-hearted patriots of 1789 looked upon the great fortified castle as the embodiment of the personal oppression which menaced their personal security—a system which tore them away from the family hearth and deprived them of the means of pursuing their lawful vocations and "securing the blessings of liberty to themselves and their posterity," keeping them in fetid dungeons under arbitrary restraint until the caprice of their tyrants set them free.

There were many Bastilles in France in those days, but that of Paris was by far the most notorious and the storming of it therefore assumed the character of a symbolic act. Few prisoners were released by that historic victory—as a matter of fact, says Larousse, only seven were found by their brave liberators—but the cry of "On to the Bastille" meant "On to Personal Liberty;" that was the dominant thought. The fruits of that cry are represented in the institutions of the France of to-day, and that they are glorious fruits all Americans heartily and gratefully recognize.

But has the idea of personal liberty, cherished by the French of 1789, been realized under the existing Republic? The answer, alas, must be "No."

Listen to the words of a learned legal writer of our own time:—"Reform (in the matter of personal liberty) has been promised us for 100 years. Looking at the question from the point of view of social justice, no objection could be made. Every one recognizes this and yet we are still waiting for it. It should have been the first modification of the Code of Criminal Instruction to be carried out by a Republican Government imbued with the principles of Revolution. * * * Why this delay? Why this inertia so opposed to a sentiment of justice no enlightened mind can tell."

Still more striking are the fiery articles from the pen of a contemporary Parisian journalist who, speaking of reforms absolutely

necessary in the French police system (which is *quasi* magisterial) exclaims "The Bastille must be taken!"

Strange as it may seem, it is, nevertheless, perfectly true, that the personal liberty of the French citizen to-day is little better protected, in some respects, than it was 100 years ago. What should have been the first task of the French patriots after demolishing the Bastille, has been left undone for a century. That first care should have been to pass a law establishing for all time the Writ of Habeas Corpus which would have, indeed, properly and adequately "secured the blessings of liberty to themselves and their posterity."

An examination of the Constitution of 1875 (the present Constitution of the French Republic) reveals careful provisions for a Republican form of Government but a fatal absence of provisions for the form which Republican liberties are to take. It lacks what we have embodied in our State Constitutions in that regard. M. E. Cadet, a distinguished legal writer, recognizes this defect when he declares that "France has not, at the present time, a Constitution properly so called, but various laws called 'Constitutional Laws' laid down in 1875 the form of the Government and the extent of the authorities."

That this is the result of 100 years' work in drafting Constitutions is surprising. No less than 10 Constitutions have been adopted in France since the Revolution of 1789, or about one Constitution for every 10 years of growth of Liberty!

Furthermore, it is astonishing how much is made of the word "Liberty" in France and how narrowly this word is understood by the people—at least from an American standpoint! Over every church-door and public building in France you see the word "liberty" cut in the stone in large characters, and orators never forget to use this magic word to stir their hearers, while the public press seems to have the word stereotyped and ready for use on all occasions. And yet personal liberty—the liberty of the citizen—is in such a strange condition after 100 years of freedom!

That all men are equal and free, in France, is never denied. That principle was asserted in the "Déclaration des Droits de l'Homme," in 1791. "No one," says article 7 of the preamble to that Constitution, "can be accused, arrested or detained except in the cases determined by the law and according to the prescribed forms."

This reads very well, but the law here referred to in a general sense, and "the prescribed forms" mentioned, are manifestly defec-

tive and fall short of what must have been popular expectation at the time the preamble was drafted and adopted.

It may have been that proper legislation was postponed at the time on account of the war cloud which burst over Europe and absorbed public attention. My point is that whatever the reasons might have been, France did not provide adequately for personal liberty at that particular time, let the golden opportunity go by and has never caught up with the pace set by the United States in this respect. The cancer of despotism was never thoroughly eradicated. Some stray roots escaped the surgeon's knife.

Presumption of innocence in France is admitted in theory in the "Déclaration des Droits de l'Homme," and is inferred, at the present day, in the Code d'Instruction Criminelle, but strange to say, in practice innocence is not presumed until the contrary has been clearly proved. In other words, the law on this point is not carried out. Over the system of criminal procedure there hangs the dark pall of tradition—venerable, white-haired, moss-backed, very respectable! This is a remnant of the cancer despotism which was not properly scotched long ago. If it had been, a writer like M. Charles Laurent would not cry in these days, "On to the Bastille," which may be fairly translated, "Down with tradition." If it were not for tradition the special laws affecting personal liberty which have filtered through the French Parliament, drop by drop, from time to time, enacting mutilated portion of the Bill of Rights, would not have been so grotesquely tinkered and so reluctantly applied.

To what, then, is this inertia on the part of French statesmen and lawyers due? Why is there a seeming reluctance to place the whole matter of personal liberty on a proper basis in France?

It is not that her statesmen and lawyers are not scientific, patriotic and imbued with the idea of liberty. But it is attributable, I venture to think, to the fact that the French lawyers are educated on the lines of the Roman Law, which they are bound to know before being admitted to practice, and because the French Codes have no corrective influence on practitioners and statesmen, but rather the contrary, in regard to throwing off the extremely conservative influence of a study of Roman Law in France. I might say here that this would not be the case in America, because we have a thoroughly corrective influence in our inherited legal system so thoroughly Anglo-Saxon. But, in France, we must not forget that before the Civil Code was enacted in France, *La Guienne*,

Gascoigne, Roussillon, the County of Foix, Languedon, Quercy, Provence, Dauphiné, Lyonnais, Forez, Beaujolais, Franche-Comté and a part of Auvergne were all governed by Roman Law. Given this fact, and the fact that the Civil Code is largely made up of that law, and the fact that Roman Law is an absolutely necessary part of every French lawyer's education and even habits of thought, and you have all the elements to account for this inertia.

This is so because Roman Law is peculiar on this very point of personal liberty. The Roman's conception of personal liberty was elementary in the extreme. He entertained no such ideas as equality and civic liberty for all. Not at all. The Roman Law defined a "persona" as free or a slave. There you have the keynote of much when you start out on your study of French law and the legal system as practised in France.

Roman law, then, recognized only two classes of people—free-men and slaves. And those slaves, we must remember, were not, as with us, negroes. They were "servi," or saved from the field of battle, and were often men of the highest birth and social position in their own country which suffered by the fortunes of war. I do not pretend that in France we see these two classes strictly exemplified at the present day, but I do venture to assert that the Roman distinction is largely responsible for the dominant idea throughout France of there being a class that governs and a class that is governed, not that that idea involves social distinction in the governing class at the present day, but that the word "Government" seems to imply something almost sovereign, almost feudal. Nothing is done without the Government—*absolutely nothing*. Even a Chamber of Commerce in France is a Government Institution. My theory explains the enormous and too often despotic power of the police which is tolerated and even considered necessary. So we see that the French conception is not that of the Anglo-Saxon, and that it starts out from a different point of view. It results from this that the idea of personal liberty in France is a matter of slow growth. It is developing, however, and to a certain extent scientifically. The development comes from the people and, with the splendid work done in the education of the masses through the public school system, a splendid future is in store for France.

It remains for us now to consider the law as it now stands in regard to personal liberty, and which is not carried out adequately owing to certain "traditions."

The recent laws of November 15, 1892, June 8, 1895, and December 8, 1897, have tended somewhat to ameliorate the hardships resulting from arbitrary arrest.

But "every year more than 10,000 innocent persons undergo the dreadful ordeal of preventative detention without having any possible redress by way of compensation," says M. Coulon, a learned French lawyer. "In 1897," said M. Monis, Minister of Justice, "out of 13,006 persons placed in houses of detention, only 1,896 cases were proceeded with, the rest being discharged."

The Code of Criminal Instruction (Procedure), Article 91, authorizes an examining magistrate (*Juge d'Instruction*) to issue an order for a suspected person to appear before him. In practice the suspected person is generally arrested at once and then examined by the magistrate. Now the Code does not intend that anyone should be arrested in this way unless it appears that there is danger of the suspected person evading justice and making good his escape before sufficient evidence has been collected to proceed to an immediate examination of the suspected person. Now, on account of there being nothing equivalent to a *Habeas Corpus* Act, a man once arrested in this way cannot regain his liberty until the examining magistrate pleases. His reputation may be absolutely ruined and his business utterly destroyed by this detention, but he has no redress. Not only are the *Juges d'Instruction* very powerful in the matter of arrest, but the Prefects of Departments (and, at Paris, the Prefect of Police) are clothed with magisterial powers by Art. 10 of the Code of Criminal Instruction—thus placing the power of arbitrary arrest in the hands of three classes of public authority—*Juges d'Instruction*, Prefects of Departments and Prefect of Police.

Under the law of 1897, although at the first preliminary investigation of the charge against a suspected person the examining magistrate is not empowered by law to do anything more than establish identity, state the charge and hear what the accused has to say, something very much more than this happens in practice. The magistrate questions the accused, confronts him with witnesses and examines the witnesses. It is not until after all this unlawful proceeding that the lawful (law of 1897) examination begins (assuming that the magistrate decides that a *prima facie* case is made out). Then for the first time is the accused allowed to have counsel present, but the latter is not allowed to speak "until after having been authorized to do so." There is no cross examination of wit-

nesses allowed at this or any future stage of the prosecution, and, to put the accused at a further disadvantage, he is often interrupted at the examination referred to by, "you did not say that at your preliminary examination." So that the magistrate has a case made out against the accused and the latter is, to a certain extent, already judged, before he comes to trial. The case for the prosecution, being made up of "evidence" of this kind reduced to writing and more or less supplemented by statements of detective officers gleaned too often from irresponsible sources—such as neighbors wishing to pay off grudges—that it is a marvel that defending counsel is able to do anything for the accused at all.

At the trial the accused's counsel can only present the case to the jury, carefully weighing the evidence for and against the accused, but this is the extent of his powers, or nearly so.

It is evident then that in the absence of cross examination of witnesses the liberty of the citizen is greatly jeopardized. Happily the French bench and bar are both adorned by lawyers of learning and character imbued with a high sense of their duties and responsibilities. The system, however, of criminal procedure in France is very defective from an American point of view and severely criticized, even in France, by prominent thinkers and writers, who deplore the inertia so conspicuous in this regard. The education of the masses is the sole remedy for this sort of thing, and it is reasonable to suppose that in time personal liberty in France will gradually become as safe as in the United States. The suppression of tradition when it supplants law, the adoption of the Writ of Habeas Corpus, the enacting of the Bill of Rights in its entirety and the introduction of cross examination at all stages of criminal proceedings, will, it is to be hoped, before long regulate criminal procedure in the great French Republic.

H. Cleveland Coxe.